U.S. Department of Justice

Immigration and Naturalization Service

ER

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Hartford (BOS) Date: AUG 22 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Certificate of Citizenship under § 341(a) of the Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT: [redacted]

Public Copy
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Boston, Massachusetts, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on March 2, 1979, in Jamaica. The applicant's father, [redacted] was born in Jamaica in March 1951 and became a naturalized U.S. citizen on January 1, 1987. The applicant's mother, [redacted] was born in 1956 in Jamaica and never became a United States citizen. The applicant's parents never married each other. The applicant was recognized by his father at birth. The applicant was lawfully admitted for permanent residence on July 14, 1991. The applicant seeks a certificate of citizenship under §§ 321 or 322 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432 or 1433.

The district director determined the record failed to establish that both of the applicant's parents had naturalized prior to the applicant's 18th birthday. The district director then denied the application accordingly.

On appeal counsel states the applicant derived U.S. citizenship under § 322 of the Act. Counsel asserts that the applicant is a U.S. citizen regardless of age and the denial on the basis that the applicant's parents were never married is also an error. Counsel then discusses a sequence of events beginning with the initial filing of a Form N-600 application in June 1996 when he was 17 years old. The applicant was told that his naturalized father cannot apply for him since he never married the applicant's mother. The applicant was told to file a Form N-400 when he turned 18 years of age.

Section 321. CHILD BORN OUTSIDE OF UNITED STATES OF ALIEN PARENT; CONDITIONS UNDER WHICH CITIZENSHIP AUTOMATICALLY ACQUIRED

> (a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
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> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
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> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
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> (4) Such naturalization takes place while said child is under the age of 18 years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent

[redacted]

residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

In Matter of Fuentes-Martinez, Interim Decision 3316 (BIA 1997), the Board stated the following: "Through subsequent discussions, [the interested agencies] have agreed on what we believe to be a more judicious interpretation of § 321(a). We now hold that, as long as all the conditions specified in § 321(a) are satisfied before the minor's 18th birthday, the order in which they occur is irrelevant."

The record establishes that (1) the applicant's father became a naturalized U.S. citizens prior to his 18th birthday, (2) the applicant was acknowledged by his father shortly after his birth, (3) he became the beneficiary of an approved visa petition filed by his father, and (4) he was residing in the United States in his father's custody as a lawful permanent resident while under the age of 18 years.

However, in order for the applicant to receive the benefits of § 321 of the Act, there must have been a legal separation of the parents. Matter of H--, 3 I&N Dec. 742 (C.O. 1949), held that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings, and where the actual parents of the child were never lawfully married, there could be no "legal separation," of such parents. Therefore, the applicant's father was not legally separated from the applicant's mother when his father naturalized. If the parents were never lawfully married, there can be no legal separation, as such, and an award of custody to a naturalized parent under such circumstances does not result in derivation even though other requisite conditions are satisfied. See INTERP 320.1(a)(6). Therefore, the applicant did not derive U.S. citizenship under § 321 of the Act.

Section 322. CHILD BORN OUTSIDE THE UNITED STATES; APPLICATION FOR CERTIFICATE OF CITIZENSHIP REQUIREMENTS

(a) APPLICATION OF CITIZEN PARENTS: REQUIREMENTS.-A parent who is a citizen of the United States may apply to the Attorney General for a certificate of citizenship on behalf of a child born outside the United States. The Attorney General shall issue such a certificate of citizenship upon proof to the satisfaction of the Attorney General that the following conditions have been fulfilled:

(1) At least one parent is a citizen of the United States, whether by birth or naturalization.

(2) The child is physically present in the United States pursuant to a lawful admission.

(3) The child is under the age of 18 years and in the legal custody of the citizen parent.

[redacted]

(4) If the citizen parent is an adoptive parent of the child, the child was adopted by the citizen parent before the child reached the age of 16 years and the child meets the requirements for being a child under subparagraph (E) or (F) of § 101(b)(1).

(5) If the citizen parent has not been physically present in the United States or its outlying possessions for a period or periods totaling not less that 5 years, at least 2 of which were after attaining the age of 14 years-

(A) The child is residing permanently in the United States with the citizen parent, pursuant to a lawful admission for permanent residence, or

(B) A citizen parent of the citizen parent has been physically present in the United States or its outlying possessions for a period or periods totaling not less than 5 years, at least 2 of which were after attaining the age of 14 years.

(b) ATTAINMENT OF CITIZENSHIP STATUS; RECEIPT OF CERTIFICATE.-Upon approval of the application (which may be filed abroad) and, except as provided in the last sentence of § 337(a), upon taking and subscribing before an officer of the Service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

Legal custody of a child as an element of derivation contained in the 1940 statute, and in the present law, may follow judicial proceedings which either terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status. Generally, the question of legal custody may be determined by the law of a state or by the adjudication of a court, whether this be in proceedings relating to the termination of the marital relationship or in separate proceedings dealing solely with the question of the child's custody.

In cases where the divorce or separation decree does not specify who has custody and the naturalized parent has physical custody, the child will derive citizenship provided that all other conditions of the law are met. If the parents have joint custody, then both parents have legal custody and the naturalization of either parent would satisfy the requirements. Section 322 of the Act does not require "legal separation"

The "Legitimation Act of Jamaica" eliminated the distinction between legitimate and illegitimate children. A child within the scope of the Jamaican Status of Children's Act of 1976 (enacted on October 19, 1976) is included within the definition of a legitimate

[redacted]

or legitimated "child" as set forth in § 101(b)(1) of the Act, so long as the familial tie or ties are established by the requisite degree of proof and the status arose within the time requirements of § 101(b)(1). See Matter of Clahar, 18 I&N Dec. 1 (BIA 1981). See Matter of Clahar, 16 I&N Dec. 484 (BIA 1978), for complete printing of §§ 3 and 4 of that Act. Clahar, 18-1 states that to meet the definitional requirements of "child" in § 101(b)(1) of the Act, the person must be under 21 years of age and any legitimation must have taken place before the child reached the age of 18 years. It is noted in Clahar, 18-1 that the applicant was born in 1956 and was too old to qualify under the status of Children's Act of 76.

8 C.F.R. 322.2(a) provides that to be eligible for naturalization under § 322 of the Act, a child on whose behalf an application for naturalization has been filed by a parent who is, at the time of filing, a citizen of the United States, must:

> (1) Be unmarried and under 18 years of age, both at the time of application and at the time of admission to citizenship;
>
> (2) Reside permanently in the United States, in the physical and legal custody of the applying citizen parent, pursuant to a lawful admission;
>
> (3) Comply with other requirements for naturalization as provided in the Act....

The record reflects that the applicant is over the age of 18 years and is not eligible for the benefits of § 322 of the Act.

There is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father's naturalization. Therefore, the district director's decision will be affirmed. This decision is without prejudice to the applicant seeking U.S. citizenship through normal naturalization procedures.

ORDER: The appeal is dismissed.